No. 20,283

United States Court of Appeals

For the Ninth Circuit

DALE MATHIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the District of Nevada, adjudging the Appellant guilty as charged in both counts of a two count indictment following a jury trial.

The offenses occurred in the District of Nevada. The District Court has jurisdiction by virtue of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 176(a). Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF PLEADINGS AND FACTS

The Appellant, on September 29, 1964, was charged by a two count indictment in the United States District Court for the District of Nevada with violating

Title 21, United States Code, Section 176(a) (R.7-8).[1] The Appellant was tried on the indictment before a jury on April 5, 8 and 9, 1965. The jury, on April 9, 1965, returned a verdict of guilty as to each count of the indictment. The Appellant, on May 24, 1965, was sentenced and judgment on the jury's verdict was entered (R.22). The Appellant's Notice of Appeal was filed on May 25, 1965 (R.23-24). Upon Appellant's Motion, the time for Docketing the Record on Appeal was enlarged to August 4, 1965 (R.3).

STATEMENT OF THE CASE

Detective Karl Albright, of the Clark County, Nevada Sheriff's Office, on July 9, 1964, introduced Harrison Allen Shearer to Federal Narcotic Agent Richard Salmi (R.T.74).[2] Agent Salmi was introduced to Shearer as a Narcotic Agent (R.T.98). Shearer, after the introduction, agreed to become an informer for Agent Salmi and to introduce Agent Salmi to dope peddlers in North Las Vegas, Nevada (R.T.99-100).

Informant Shearer, in the early morning of July 10, 1964 (R.T.76), approximately one hour after meeting Agent Salmi (R.T.98), drove with the Agent, in the Agent's car, to the Appellant's residence in North Las Vegas, Nevada. The Informant introduced Agent Salmi as Dickie to the Appellant. Agent Salmi

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[1] "R." refers to the Record, Volume I.

[2] "R.T." refers to the Reporter's Transcript.

afterwards discussed purchasing pound quantities of marihuana with the Appellant (R.T.76). This conversation took place in Agent Salmi's car, in front of the Appellant's residence (R.T.77). Then the Appellant, the Informant and the Agent, in Agent Salmi's car, drove away from the Appellant's house and after driving for a while, the Appellant directed Agent Salmi to a park in North Las Vegas, Nevada (R.T. 78). The Appellant directed Agent Salmi to pull into a parking lot and to park the car. The group then left the car and walked into the park area (R.T.78). The group at this point was accosted by police officers, searched for weapons and questioned, but were not arrested (R.T.79-80). The police then left the area and the group proceeded on into the park. The Appellant and the Informant walked towards a shed and Agent Salmi followed. The Appellant and Agent Salmi entered the shed together and Agent Salmi observed the Appellant reach up to a rafter and remove a small vial (R.T.81, 103). The Appellant, followed by Agent Salmi, walked out of the shed and the Appellant then handed the vial to the Informant who had been standing outside the shed. The Informant placed the vial in his shirt pocket (R.T.59, 82, 104) and thereafter the three men left the park, returned to Agent Salmi's automobile and drove to the Bonanza Club. Agent Salmi parked his car at the Bonanza Club (R.T.82, 105) and locked the car (R.T.105). The three men then entered the Bonanza Club and seated themselves for refreshments. The Appellant and Agent Salmi proceeded to discuss the purchase and sale of large

quantities of marihuana (R.T.83). The group, at approximately 3:00 o'clock A.M. left the Bonanza Club, re-entered Agent Salmi's car and drove the Appellant to his residence (R.T.84), discharged the Appellant from the car and drove away (R.T.85). After Agent Salmi and the Informant left the Appellant's residence, the Informant removed the vial from his left shirt pocket and handed it to Agent Salmi (R.T.86). A few minutes later Informant Shearer left the car (R.T.87) and Agent Salmi returned to the Castaways Hotel (R.T.88). There Agent Salmi met Narcotic Agent Yanello (R.T.88, 139), and the plastic vial was at that time placed in a lock-seal envelope (R.T.109). The plastic vial and its contents were admitted into evidence as Exhibits 4 and 5 (R.T.126) and comprise Count I of the indictment (R.7).

The Appellant was arrested on the above charge at his residence in the early morning of September 17, 1964, by a number of officers from the Clark County Sheriff's Office, United States Marshal's Office and by Agent Salmi (R.T.149). After the Appellant was arrested and during his booking process at the County Jail, he was found to possess part of a marihuana cigarette (R.T.152). The partial cigarette was discovered by Detective Eugene Smith during his physical search of the Appellant and his clothes. The partial cigarette was admitted into evidence as Exhibit 9 and comprises Count II of the indictment (R.7).

The Appellant filed a Motion to Suppress as Evidence the marihuana alleged in the indictment (R.9-14), which Motion was denied by the Court (R.T.124).

The Motion to Suppress was supported by the Affidavit of Harrison Allen Shearer, the Government Informant (R.11-12). The Government, during the trial, called Shearer as a witness and was allowed to question him as a hostile witness (R.T.36). A statement, signed by the witness, was marked as Exhibit 10 for identification (R.T.34) and when showed to the witness was asserted to have been signed involuntarily (R.T.34). The witness was questioned concerning the truth or falsity of the statement (R.T.37-40). A letter the witness Shearer stated he wrote to the Appellant was marked as Exhibit 11 for identification and the Appellant, over objection, was questioned by Government counsel relative to the proposed Exhibit (R.T. 41-47). The Trial Judge also questioned the witness Shearer in the presence of the jury regarding Exhibits 10 and 11 for identification (R.T.68-73). Neither of the proposed Exhibits were admitted into evidence (R.T.155).

The Appellant moved for a Judgment of Acquittal at the conclusion of the Government's case (R.T.156) and again at the conclusion of all evidence (R.T.222). Both motions were denied by the Court (R.T.157, 222). The Appellant, after a verdict of guilty as to both counts of the indictment, filed a Motion for Judgment of Acquittal or in the Alternative a Motion for a New Trial (R.18-21). The Court, after oral argument, denied Appellant's Motion (R.T. M.J.A. 3-8).[3]

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[3]"R.T. M.J.A." refers to Reporter's Transcript, Motion for Judgment of Acquittal.

The Appellant was sentenced on May 24, 1965 and committed to the custody of the Attorney General for a period of seven (7) years for each count of the indictment, to run concurrently (R.22, 28-31). The Appellant filed his Notice of Appeal from the judgment on May 24, 1965 (R.23-24).

SPECIFICATIONS OF ERROR

1. The Court's error in permitting the witness Shearer to be questioned, in the presence of the jury, concerning Exhibits 10 and 11 for identification.

2. The Trial Court's giving Court's Instruction A:

"Now, the witness, Harrison Shearer, or Allen Shearer, whatever his full name was, was examined by counsel and by the Court as to certain portions of or quotations from two prior written statements made by him. One statement marked Exhibit 10 for Identification, but not received in evidence, was a statement in the handwriting of Agent Salmi signed by the witness Shearer. The other statement, marked Exhibit 11 for Identification, also not received in evidence, was a letter written by the witness Shearer to the defendant.

Now, it appeared to the Court that some of the quoted portions of these two prior written statements were inconsistent with the testimony of the witness Shearer given before you.

The only purpose of so questioning witness Shearer and confronting him with portions of or quotations from his prior written statements while he was on the stand was to permit you to weigh

those portions and quotations of the prior statements and his answers when questioned about the same, together with his other testimony given before you, all for the purpose of assisting you in determining what credibility and weight you may wish to give to the testimony of the witness Shearer.

It is the exclusive province of the jury to disregard the Court's comment that there are inconsistencies between portions of the prior written statements and the defendant's testimony before you. The jury alone are the sole judges of the facts, not the Court.

Now, and this is most important, no part of these prior statements or of Shearer's answers when questioned about the same in any way bind the defendant. They do not constitute any evidence against him. The said evidence was received only for the limited purpose that I have just described and such evidence is not to be considered in determining the guilt or innocence of the defendant. I make particular reference in this regard to the letter to the defendant, Exhibit 11 for Identification. The portions of and quotations from that letter that you have heard are not evidence against this defendant. In order for you to find the defendant guilty, you must be convinced of his guilt beyond a reasonable doubt from all of the other evidence in the case, exclusive of any of the portions or quotations from the two prior written statements of the witness Shearer's answers when questioned about the same." (R.T. 263-265.)

The Appellant objected to Court's Instruction A on the ground the statements read to the witness were not in evidence and the Court's Instruction only amplified the importance of the statements to the jury (R.T.275).

3. The Trial Court's error in denying Appellant's Motion for Judgment of Acquittal or Appellant's Alternative Motion for a New Trial.

SUMMARY

The Appellant was indicted, tried, and convicted for possessing marihuana on two separate occasions. The Appellant takes the position that the evidence before the Court upon which the Appellant was convicted was insufficient as a matter of law to show that on either occasion the Appellant had possession and knowledge of the marihuana and that without proof of possession the evidence did not prove illegal importation of the marihuana as required by the charging statute.

That the paucity of the evidence touching on Appellant's possession of marihuana was strengthened by permitting the Government to question the witness Harrison Allen Shearer concerning proposed Exhibits 10 and 11, extrajudicial documents, which were not in evidence and from which the jury could infer Appellant's participation and guilt.

ARGUMENT

I.

THE COURT'S ERROR IN PERMITTING THE WITNESS SHEARER TO BE QUESTIONED, IN THE PRESENCE OF THE JURY, CONCERNING EXHIBITS 10 AND 11 FOR IDENTIFICATION.

The Appellant was indicted on September 29, 1964 for the offenses upon which this appeal is taken (R.7-8). The Appellant, on March 9, 1965, prior to his jury trial, filed a Motion to Suppress Evidence (R.9-10). The Motion was directed to the suppression of the marihuana alleged in the indictment. Thereafter, on April 2, 1965, the Appellant supplemented his Motion to Suppress by the Affidavit of Allen H. Shearer (R. 11-13). This affidavit was filed on April 2, 1965 and served the same day on the United States Attorney for the District of Nevada (R.13).

The Appellant's jury was selected on April 5, 1965 and the trial took place on April 8 and 9, 1965 (R.9). The second witness called by the Government was Harrison Allen Shearer (R.T.31), who was the same person as Affiant Allen H. Shearer (R.11-13). The witness Shearer testified concerning his meeting with Narcotic Agent Salmi, his acquaintance with the Appellant, and introducing the two men to each other (R.T.31-34). During direct examination the witness Shearer was shown Plaintiff's Exhibit 10 for identification and asked if he recognized his signature on the bottom of the second page (R.T.34).

The witness acknowledged his signature, read the statement, but denied signing the statement voluntarily (R.T.35). He testified he had signed the statement

under threat of being returned to jail (R.T.35). At this point the Government requested the Court to declare the witness hostile and permit leading questions; which request was granted (R.T.36). Thereafter, the Government questioned the witness, using the question form "isn't it true" (R.T.36-40).

The Government specifically referred to Plaintiff's Exhibit 10 for identification and from the statement questioned the witness over objection, on the ground of impeaching one's own witness (R.T.40).

The Trial Judge, when the Government and the defense had completed examination of the witness, questioned the witness concerning the truth or falsity of his statement, proposed Exhibit 10. The Court read excerpts from the statement to the witness and asked if the portion read was true (R.T.68-72). Objection was made to this procedure by Appellant's counsel (R.T.72).

A letter, from the witness Shearer to the Appellant, was marked Exhibit 11 for identification (R.T.40-41). The letter referred to Appellant's other marihuana activities (R.T.42-44). The Trial Court permitted the Government to question the witness, over objection, by quoting from proposed Exhibit 11 (R.T.44-47). The entire proceedings touching on Exhibits 10 and 11 for identification, took place in the presence of the jury.

The rule against a party impeaching its own witness and exceptions to the rule were stated by this Circuit in *Meeks v. United States,* 179 F.2d 319 (9th Cir. 1950). This Court noted the rule does not apply

(1) where the prosecution in a criminal case is under a legal duty or obligation to call the witness, (2) where the witness has testified before the grand jury, and (3) where the Court compels the prosecution to call the witness. The witness Shearer, called by the Government, does not fit the three classifications. Nonetheless, Shearer's credibility was placed in issue by the Government's use of proposed Exhibit 10 and resulted in his impeachment in the eyes of the jury. The Government's use of proposed Exhibit 10 to destroy the probative effect of Shearer's testimony was proper only if the Government was surprised by his testimony. *Fong Lum Kwai v. United States,* 49 F.2d 19, 20 (9th Cir. 1931).

The Government never vocally asserted surprise at Shearer's testimony. The witness Shearer was asked, immediately prior to marking Plaintiff's Exhibit 10 for identification, the following:

> "Q. (Mr. Linnell) What happened at Fantasy Park?
>
> A. (Witness Shearer) Nothing that I know of." (R.T.34).

The Government counsel then marked the witness' statement as Exhibit 10 for identification, showed it to the witness for his examination and questioned him concerning it:

> "Q. (Mr. Linnell) Did you sign it voluntarily?
>
> A. (Witness Shearer) More or less.
>
> Q. (Mr. Linnell) What do you mean by 'more or less'?

A. (Witness Shearer) Really wasn't voluntarily.

Q. (Mr. Linnell) Why wasn't it voluntarily?

A. (Witness Shearer) Because I was told if I didn't I would be put back in jail.

Q. (Mr. Linnell) By whom?

A. (Witness Shearer) By Richard Salmi.

Q. (Mr. Linnell) Where was this?

A. (Witness Shearer) In the Castaways Hotel.

Q. (Mr. Linnell) Castaways?

A. (Witness Shearer) Yes." (R.T.35).

The Government at this point requested the witness to be declared hostile and leading questions permitted, which request the Court granted (R.T.36). We must assume the Trial Court merely found the witness recalcitrant for the record is devoid a factual surprise nor was surprise asserted by the Government.

Counsel's assurance to the Court that surprise exists is sufficient. *United States v. Graham,* 102 F.2d 436, 442 (2nd Cir. 1939). But, the surprise must be genuine to the party calling the witness. *Gendelman v. United States,* 191 F.2d 993, 996 (9th Cir. 1951). The witness must be called in good faith, and surprise shown before leading questions by cross-examination is permitted. *Banks v. United States,* 204 F.2d 666 (8th Cir. 1953).

Surprise at Shearer's testimony did not exist. The Government had been served with Shearer's Affidavit (R.11-13) prior to trial. Shearer's testimony should have been anticipated by the calling party. "One who

calls a witness and anticipates adverse testimony cannot plead surprise and treat him as adverse. . . ." *United States v. Biener,* 52 F.Supp. 54 (U.S.D.C. E.D.Penna. 1943). The witness Shearer, with his statement, proposed Exhibit 10, in front of him on the witness stand was questioned at length by the Government (R.T.36-40). Most damaging and prejudicial to the Appellant were the questions pertaining to Appellant's runner bringing in marihuana and the simultaneous reference by the prosecutor to Exhibit 10 for identification (R.T.39-40).

The prosecution, prior to trial, having been served with Shearer's Affidavit (R.11-13) was under a duty to make inquiry what Shearer's testimony would be. The inquiry rule was announced by this Circuit in *Sullivan v. United States,* 28 F.2d 147 (9th Cir. 1928), the Court at page 149 stated: "In any event a party cannot claim to be surprised by the testimony of a witness, when he has failed to make inquiry as to what the testimony will be before calling the witness to the stand. . . ." The inquiry rule was relaxed by this Circuit in *Stevens v. United States,* 256 F.2d 619 (9th Cir. 1958), but only if the Government can reasonably rely on the prior statement as the truth and to which the witness will testify.

Retrospectively, the prosecution's use of Exhibit 10 for identification had a twofold purpose. Either to neutralize the effect of Shearer's testimony or to get into evidence before the jury Shearer's ex parte statement.

The use of the statement to neutralize Shearer's testimony, presupposes injury to the Government's cause. Clearly, Shearer's testimony through the marking of Exhibit 10 for identification (R.T.34) was not injurious to the Government's case. The Government's use of proposed Exhibit 10 was error and exceeded the range of the rule in *Kuhn v. United States,* 24 F.2d 910 (9th Cir. 1928) where this Court said at page 913, "The maximum legitimate effect of the impeaching testimony can never be more than the cancellation of the adverse answer by which the party is surprised. . . ." Accord, *Culwell v. United States,* 194 F.2d 808 (5th Cir. 1952).

The alternate use of the statement before the jury under the guise of impeachment was error and prejudicial. *Young v. United States,* 97 F.2d 200 (5th Cir. 1938), *Kuhn v. United States,* supra.

The United States Court of Appeals for the Fifth Circuit in *Young v. United States,* supra, cited *Kuhn v. United States,* supra, and gave its approbation to the procedure of withdrawing a witness and striking the witness' testimony, when the witness testifies adversely to the proponent's cause.

The jury's attention was further focused on proposed Exhibit 10, when the witness Shearer was questioned by the Trial Court on the truth or falsity of portions of the statement that the Court read to the witness (R.T.68-72). The action of the trial falls within the ambit of *Kuhn v. United States,* supra, and the procedural prohibition therein pronounced.

The prosecution marked as Exhibit 11 for identification, a letter from the witness Shearer to the Appellant (R.T.40). The letter was in Shearer's handwriting and so identified by the witness (R.T.41). The letter by Shearer's testimony was mailed to the Appellant by certified mail (R.T.42). The Court allowed the prosecution in examining the witness to quote from the letter. Appellant objected to the procedure (R.T.44). The letter was a fugitive document. There was no evidence the letter was ever received by the Appellant. The Government further did not lay a foundation and bring into play, the rebuttal presumption of the letter's receipt by the Appellant. *Hagner v. United States,* 285 U.S. 427, 52 S.Ct. 417 (1931).

If the purpose of the letter was to neutralize the witness' testimony, it exceeded the purpose, *Kuhn v. United States,* supra, and referred to other narcotic activity of the Appellant (R.T.42-47), plus the self-assertion of the witness that he could harm the Appellant in Court (R.T.47).

The contents of proposed Exhibits 10 and 11, inadmissible hearsay evidence, were brought before the jury under the artifice of impeachment. *Young v. United States,* supra. Cf. *Bateman v. United States,* 212 F.2d 61 (9th Cir. 1954). The jury not only saw proposed Exhibits 10 and 11, but the entire reading of the proposed exhibits took place in the presence of the jury. The resulting testimony related to hearsay matters, inadmissible as substantive evidence. *Feutralle v. United States,* 209 F.2d 159 (5th Cir. 1954).

But Cf, *Bieber v. United States,* 276 F.2d 709 (9th Cir. 1960). The Fifth Circuit in *Young v. United States,* supra, reversed a conviction on the ground that ex parte statements and a letter were improperly admitted into evidence against the defendant.

The Trial Court by Instruction A (R.T.263-265) instructed the jury concerning the purpose for which they were to consider Exhibits 10 and 11 for identification. That the questions relating to the proposed exhibits were for the purpose of assistance in determining the credibility of the witness Shearer.

The proposed Exhibits 10 and 11 were not admissible as substantive evidence, *Bridges v. Wixon,* 326 U.S. 139, 65 S.Ct. 1443 (1945), *United States v. Barnes,* 319 F.2d 291 (6th Cir. 1963), and were not in fact admitted into evidence (R.T.155).

The Court instructed the jury regarding Shearer's credibility (R.T.263-265). ". . . (T)hat the legal distinction between credibility and to establish the stated fact, 'is a fine one for the lay mind to draw.' . . ." *Slade v. United States,* 267 F.2d 834, 839 (5th Cir. 1959). Therein the danger lies. Were the Appellant's jurors able to draw the line between Shearer's credibility and the stated fact of his testimony concerning proposed Exhibits 10 and 11. The Court's Instruction A (R.T.263-265) left the jurors to disentangle the stated fact.

The Second Circuit Court of Appeals in *United States v. Block,* 88 F.2d 618 (2nd Cir. 1937) consid-

ered a factually similar case and said in the opinion by L. Hand, Circuit Judge, at page 620:

> "The judge's charge mended nothing; he left the jury to disentangle in their minds the innocuous part which the witness had conceded, from the great bulk which he had disaffirmed. The hearsay remained as effective as before, and really the prejudice was incurable anyway, whatever he might have said. . . ."

The manner in which proposed Exhibits 10 and 11 were used during the trial, was, it is submitted, prejudicial to the Appellant and reversible error.

II.

THE TRIAL COURT'S ERROR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR APPELLANT'S ALTERNATIVE MOTION FOR A NEW TRIAL.

The Appellant, at the conclusion of the Government's case in chief, moved for a Judgment of Acquittal on the ground the prosecution had failed to show the Appellant possessed the marihuana alleged in Count I of the indictment. The Court denied the motion (R.T.156). The Appellant, at the conclusion of all evidence, again moved for a Judgment of Acquittal as to both counts of the indictment on the ground the Government had failed to prove Appellant's possession of the marihuana (R.T.156).

The Court, in considering both motions, was required by *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1941), to view the facts in the light most favorable to the Government.

The evidence most favorable to the Government showed that H. A. Shearer, during the early evening of July 10, 1964, placed a plastic vial on a rafter in a play house at Fantasy Park, North Las Vegas, Nevada (R.T. 51-52). The plastic vial contained catnip. The catnip had been placed in the plastic vial by Shearer for delivery to Narcotic Agent Salmi on the representation the vial contained marihuana (R.T. 52, 54).

After introductions, the Appellant, Shearer and Agent Salmi went to Fantasy Park. The Appellant's delivery of the vial to Shearer was the only evidence offered by the Government showing Appellant's possession of the marihuana alleged in Count I of the indictment (R.T.7-8; R.T.58, 104). The Appellant reached up on the rafters in the play house, took the vial and handed it to Shearer (R.T.81, 103). Thereafter, Shearer retained possession of the vial. The Appellant denied going to the play house and obtaining a vial from the rafters (R.T.203). Shearer testified that he left the vial on the seat in Agent Salmi's car when the three men were in the Bonanza Club (R.T. 59-60). The Informant Shearer delivered the vial to Agent Salmi, out of the Appellant's presence (R.T.83-93-106). There was no conversation between the Appellant and Shearer concerning the vial, nor was money exchanged.

The Ninth Circuit in an early case, *Mulaney v. United States,* 82 F.2d 638 (9th Cir. 1936), held possession sufficient to support the inference of guilt meant having the narcotic drug in one's control or

nder one's dominion. The record is clear that the Appellant did not have control or dominion of the marihuana contained in the vial. Control and dominion was at all times in the Informant Shearer. Actual or constructive possession of the vial of marihuana could not be honestly, fairly and conscientiously inferred and the conviction should not stand. *Hernandez v. United States,* 300 F.2d 114 (9th Cir. 1962). The facts might establish a willingness on Appellant's part to assist Shearer in overcoming the threat of prosecution (R.T.49), but the facts do not establish beyond a reasonable doubt possession of the marihuana. The vial was where Shearer said it would be (R.T.55) and the Appellant merely delivered the vial, not to Agent Salmi, but to Shearer. The proof of Appellant's possession was as meager as the proof of possession in *Williams v. United States,* 290 F.2d 451 (9th Cir. 1961) which was reversed.

The possession of a narcotic must be a knowing or knowledgeable possession. That is, the possessor must know that what he possesses is a narcotic. Unless there is knowing possession the proof fails and acquittal must follow. *Gueuara v. United States,* 242 F.2d 745 (5th Cir. 1957). The uncontroverted facts show Appellant believed the vial to contain catnip (R.T.54-55). There was no other evidence before the Court to refute this knowledge or belief.

Count II of the indictment charges Appellant with possession of a portion of a marihuana cigarette (R.T. 7-8). The evidence most favorable to the Government, *Glasser v. United States,* supra, shows the cigarette

was found in Appellant's right levi trouser pocket by Detective Smith during Appellant's booking procedure on September 17, 1964 (R.T.446).

The Appellant had taken off his levis and handed them to Detective Smith, who searched the levis and found the cigarette (R.T.148). The presence of the cigarette was denied by the Appellant (R.T.200-201). The Appellant was indicted on September 29, 1964 (R.T.1-8). Count II of the indictment charges Appellant with possession of the marihuana cigarette on September 17, 1964.

The chemical analysis of the cigarette, Exhibit 9 (R.T.155) was made by Government Chemist Muron on September 25, 1964 (R.T.24) and the cigarette was determined to be marihuana (R.T.24). The chemist's report setting forth Chemist Muron's findings was not received by the Bureau of Narcotics in Los Angeles, California, until October 12, 1964, subsequent to the grand jury proceedings and Appellant's indictment.

The Appellant objected to the admission into evidence of Exhibit 9 on the ground there was no competent evidence before the Grand Jury of the cigarette's marihuana content. (R.T.154-155).

The rule is legion that an indictment is presumed to be founded on competent evidence. *United States v. Johnson,* 319 U.S. 503, 63 S.Ct. 1233, 87 L.Ed. 1546 (1943). The burden is upon the Appellant to overcome the presumption and is addressed to the sound discretion of the Court, *Sutton v. United States,* 79 F.2d 863 (9th Cir. 1935). The evidence showed that Exhibit

9 was found by Detective Smith (R.T.146); that he thought it was a marihuana cigarette, but did not analyze it, and gave the cigarette to a narcotic agent (R.T.153). That Narcotic Agent Windham took the cigarette, sealed it in an envelope and mailed it to the chemist on September 21, 1964 (R.T.130). That Exhibit 9 was tested by the chemist on September 25, 1964 (R.T.23) and the report of the test received by the Narcotic Bureau on October 12, 1964 (R.T.133).

The Appellant sustained his burden of proof and showed the grand jury did not have competent evidence upon which to return Count II of the indictment.

CONCLUSION

The Trial Court erred as set forth in Appellant's specifications of error and the judgment, accordingly, should be reversed and remanded for a new trial.

Dated, Las Vegas, Nevada,
August 28, 1965.

Respectfully submitted,
BABCOCK & SUTTON,
By RAYMOND E. SUTTON,
Attorneys for Appellant.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Raymond E. Sutton,
Attorney for Appellant.